

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION II

E08-19

October 29, 2008

J. B. HUNT TRANSPORT, INC.		
	APPELLANT	APPEAL FROM THE ARKANSAS
V.		BOARD OF REVIEW
		[2007-BR-1767]
DIRECTOR, DEPARTMENT OF		
WORKFORCE SERVICES AND		
MICHAEL P. CLARK		
	APPELLEES	AFFIRMED

In this unemployment case, the Board of Review overturned the Appeal Tribunal's denial of benefits to appellee, Michael Clark. J.B. Hunt Transport, Inc., his former employer, appeals the Board's decision, presenting two points of appeal: 1) Clark's violent tendencies and criminal conviction for such violence constitute misconduct connected to the work, including willful violation of rules or customs of J.B. Hunt, disqualifying him from unemployment benefits, 2) Clark's actions also constitute dishonesty and perjury, disqualifying him for unemployment benefits. We affirm.

The Appeal Tribunal concluded that appellant was discharged from his employment for misconduct in connection with the work because he did not report his conviction for domestic battery to his employer. Appellee's argument was that the

company's policy, which requires employees to report negative background information affecting their background checks, did not apply to him because it went into effect after he was employed and he was not made aware of its existence. The Tribunal was not convinced by this argument and reasoned that the employer had the authority to establish employment policies; that, once adopted, employees are bound by those policies; and that Michael Clark knew his background check would be affected by his conviction. On this reasoning, the Tribunal determined that Clark's failure to report the conviction was a willful violation of the duties and obligations owed to his employer, and that his discharge was for misconduct in connection with the work.

The Board of Review reversed the Tribunal's decision, concluding that Clark was discharged for not reporting his conviction, *not* for the off-duty conduct that supported the conviction; that the employer did not establish that Clark had been made aware of the policy concerning the reporting of convictions; that, while Clark might have been negligent in not keeping apprised of J.B. Hunt's new policies, that conduct did not amount to a willful or wanton disregard or negligence of such a degree as to manifest wrongful intent or evil design; that ordinary negligence does not amount to misconduct; and that, therefore, Clark was discharged for reasons other than misconduct in connection with the work.

Standard of Review

Our scope of appellate review in cases such as this is well settled and was set forth in *Maxfield v. Director*, 84 Ark. App. 48, 54, 129 S.W.3d 298, 302 (2003):

On appeal, the findings of the Board of Review are conclusive if they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it.

See also Ark. Code Ann. § 11-10-529(c)(1) (Repl. 2002) (Board's findings are conclusive if supported by evidence and without fraud). In addition, matters of witness credibility and the weight to be accorded testimony are matters to be resolved by the Board. *Maxfield supra*.

Summary of Evidence

At the November 7, 2007 Appeal Tribunal hearing, Mark Emerson, a J.B. Hunt vice president, testified that Michael Clark was hired as an internal driver recruiter on May 15, 2006; that he was discharged on September 18, 2007; that Clark was convicted of a felony and that he was about to start serving time; that J.B. Hunt has an ethics policy requiring employees to report to the company any arrests or convictions; that David Coombs was Clark's immediate supervisor; that he (Emerson) was Coombs's supervisor; and that Clark did not tell him or Coombs about the arrest and conviction. Emerson testified that he asked Clark if he had gotten into any legal trouble recently; that Clark suggested he had but that he was appealing; that Emerson asked him if he had reported those facts to his supervisor; that Clark responded, "no"; that he asked Clark if he was

aware that he needed to report that information; and that Clark “didn’t say yes [he] was aware but he understood that that was something we needed to know.”

David Coombs testified that he did not talk to Clark about his legal issues prior to his discharge; that Clark did not come to him and report any legal issues; that Mark Emerson informed him (Coombs) of Clark’s legal troubles; and that at the time of Clark’s discharge, Clark told him that he was not aware he was supposed to report that type of thing.

Michael Clark testified that at the time he was hired J.B. Hunt provided him with an employee handbook; that he was not aware of the company policy stated on page one that “current employees are expected to report information that would negatively affect their current background check status”; that the policy’s effective date was July 1, 2006; that he was hired May 15, 2006; that he was tried by a jury and convicted of battery on September 9, 2006; that he was sentenced to forty-two months in prison but is out on an appeal bond; and that the new policy took effect during his employment but he was not aware of it. He stated that at the time of his hire, his employer asked him if he had a criminal conviction, and that he did not at that time. He stated that he was not aware that J.B. Hunt’s policies are located on a computer system where all employees have access, and that he went through orientation, during which policies and procedures were reviewed with him.

Mark Emerson was recalled and explained that J.B. Hunt’s policies are “kept on our connections with the internet site that we have”; that this is also discussed at orientation;

that some policies are sent through company e-mail to say there is a change; that he (Emerson) did not know if this particular one was or not, but that it was widely known that all policies are kept out there and are visited frequently; and that it was always the employees' responsibility to make sure they are up to date on current policies.

Michael Clark stated that J.B. Hunt's policies are not communicated in such a way that the employees are aware of them, and that he was very sure that was true because he knew a lot of friends who still work there and they were not aware of this policy. He acknowledged that he did not report his conviction to his immediate supervisor or manager.

Misconduct

Appellant's points of appeal are sufficiently interrelated that they can best be discussed together. Arkansas Code Annotated section 11-10-514(a)(1) (Repl. 2002) provides that an individual "shall be disqualified for benefits if he is discharged from his last work for misconduct in connection with the work." The employer has the burden of proving misconduct by a preponderance of the evidence. *Grigsby v. Everett*, 8 Ark. App. 188, 649 S.W.2d 404 (1983). Misconduct is defined as (1) disregard of the employer's interests; (2) violation of the employer's rules; (3) disregard of the standards of behavior which the employer has a right to expect of his employees; (4) disregard of the employee's duties and obligations to the employer. *Nibco, Inc. v. Metcalf*, 1 Ark. App. 114, 613 S.W.2d 612 (1981). There is an element of intent associated with a determination of misconduct on the part of the employee. *Oliver v. Director, Ark. Emp. Sec. Dep't*, 80 Ark. App. 275, 94

S.W.3d 362 (2002). Therefore, mere unsatisfactory conduct, ordinary negligence, or good-faith errors in judgment or discretion are not considered misconduct unless they are of such a degree or recurrence as to manifest wrongful intent, evil design, or an intentional disregard of the employer's interests. *Niece, supra*. Whether an employee's acts are willful or merely the result of unsatisfactory conduct or unintentional failure of performance is a fact question to be decided by the Board. *Id.*

J.B. Hunt summarizes its argument as follows. Any reasonable employee would know that the commission of a felony that included violent acts against another person, with aggravating factors including but not limited to "persistent criminal misconduct," and that involved incarceration of forty-two months in the state penitentiary would be contrary to the standards of behavior that his employer had a right to expect and would result in his discharge; that the willful withholding of such important information cannot be anything short of misconduct and certainly rises to the level of a willful violation of rules or customs of J.B. Hunt; that this willful violation is further evidenced by the undisputed testimony by J.B. Hunt's representative, Mark Emerson, that J.B. Hunt had an ethics policy that required Clark to report an arrest or conviction to his manager; and that J.B. Hunt also demonstrated dishonesty when Clark "lied under oath" at the hearing because he testified that he did not have a conviction at the time of hire, but he did.

The first part of J.B. Hunt's argument is problematic, as noted in footnote 1 of the Board's decision¹; specifically, Clark was not fired for the underlying conduct, *i.e.*, the commission of a felony; rather, the reason given for his discharge was that he had violated company policy by not reporting his arrest/conviction to his supervisors. J.B. Hunt next argues that the withholding of such information constituted misconduct because it was a willful violation of the employer's rules/customs and that Mark Emerson's testimony was undisputed that J.B. Hunt had a policy requiring employees to report arrests/convictions to their managers. This part of J.B. Hunt's argument is likewise problematic. The Board concluded that "a preponderance of the evidence did not establish that the claimant had been aware of the employer's policy concerning reporting convictions." The Board reasoned that Clark might have been negligent in not keeping up with new company policies, but that such negligence did not constitute misconduct. Finally, there is no finding by the Board concerning whether Clark lied under oath, and his credibility concerning company rules/policies was clearly credited by the Board. There is nothing for us to review concerning J.B. Hunt's last contention.

¹Footnote 1 of the Board's decision explained: "Of note is that the claimant was discharged for not reporting the conviction, and not because of the apparent off-duty actions which led to the arrest and conviction. If the employer had discharged the claimant for what appeared to be his off-duty actions, for a finding of misconduct, the employer would then have had to establish the elements noted in *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983), which are that the employee's conduct (1) had some nexus to the work, (2) resulted in some harm to the employer's interests, and (3) was in fact conduct which was (a) violative of some code of behavior contracted between employer and employee, and (b) done with intent or knowledge that the employer's interests would suffer.

While the evidence presented in this case might support a different conclusion, we cannot say that the Board could not have reasonably reached the decision that it did. We, therefore, hold that the Board of Review's decision to grant unemployment benefits to appellee is supported by substantial evidence.

Affirmed.

BIRD and GRIFFEN, JJ., agree.